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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 170

EDWARD McGREW,

Petitioner,

vs.

WILLIAM P. SIMMONS, FRANCIS R. HARBISON AND DUQUESNE HEIGHTS BUILDING AND LOAN ASSOCIATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable Harlan Fiske Stone, Chief Justice of the Supreme Court of the United States and to the Associate Justices of the Supreme Court of the United States:

The petitioner, EDWARD McGREW, prays that a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit may issue to review the decrees of that Court made on March 23, 1942, in the abovementioned cause.

Proceedings.

a. *District Court.*

This cause arose under the provisions of the popularly known, and hereinafter referred to, Frazier-Lemke Act

(August 28, 1935, c. 792, 49 Stat. 942, amended March 4, 1940, c. 39, secs. 1, 2, 54 Stat. 40, 11 U. S. C. A. 203).

The petitioner herein filed his petition to effect a composition or to extend time to pay debts on May 11, 1937, after which, on July 21, 1937, on petition, the petitioner was adjudged a bankrupt and the matter was referred to DANIEL S. HORNE, ESQ., The Conciliation Commissioner for Allegheny County, (R. 13-14). Subsequently, William P. Simmons, one of the respondents herein, filed a Petition for Appointment of Trustee, with Louis Vaira, successor Conciliation Commissioner, alleging, inter alia, that he was a preferred creditor of MCGREW, which was ordered filed objections (R. 26-7). Testimony was taken before Vaira (R. 82-89), after which he filed a Report and Recommendation containing findings of fact that the debtor was not a farmer; had not conducted the proceedings in good faith, and had no possibility of rehabilitation since there was no equity for him in any of his real estate; and the proceedings have resulted in deprivation of the creditors' rights, recommending dismissal of the proceedings (R. 27-31). A hearing for exceptions was then set by the lower court (R. 32). Exceptions were duly filed by MCGREW (R. 32-34), and on the same day he filed a Request for Reappraisal (R. 35) to which SIMMONS filed an Answer (R. 37-40) as did FRANCIS R. HARBISON (R. 41-44).

On July 10, 1941, Judge Schoonmaker of the District Court filed an Opinion captioned as disposing of the exceptions as well as the petition for re-appraisement, although the Decree entered only disposes of the exceptions, the opinion stating that it was unnecessary to pass on the reappraisement petition (R. 45-49).

b. *Circuit Court of Appeals.*

Notice of appeal was filed on August 25, 1941, appealing from the confirmation of the report of the Conciliation Com-

missioner and failure to pass upon the petition for re-appraisement of the debtor's real estate (R. 49). On September 22, 1941, the appellant filed his Designation of Portions of the Record, etc. To Be Contained in the Record on Appeal (R. 50) and Statement of Points on Which Appellant Intends to Rely (R. 51). On October 1, 1941, the Appellees filed an Amended Designations, etc. To Be Contained in the Record on Appeal (R. 80-81).

The matter was argued on November 5, 1941, before Circuit Judges Clark and Jones of the Third Circuit and Judge Ganey, District Judge for the Eastern District of Pennsylvania, by special order, the opinion of the court being filed on March 23, 1942, and being written by Judge Clark. The Opinion upheld the lower court's contention that it did not have jurisdiction and hence could not order the re-appraisement. Judge Jones concurred in the result.

Parties.

The petitioner herein, EDWARD MCGREW, is the debtor of the respondents, WILLIAM P. SIMMONS, FRANCIS R. HARBISON and DUQUESNE HEIGHTS BUILDING AND LOAN ASSOCIATION, mortgagees secured by the real estate involved herein.

Summary Statement of the Matter Involved.

The affirmance of the lower court was based upon two grounds: (1) that the facts produced by the petitioner do not disclose him to be a "farmer" within the statute and hence not within the jurisdiction of the Court; and (2) that this jurisdictional question can be raised by the court at any stage of the proceedings sua sponte. In support of its position as to (1) the court relies upon a portion of the petitioner's testimony which appears in a footnote of the opinion of the Circuit Court (R. 97-8). As to (2) it relies on several lower court decisions (R. 97).

The petitioner appeared for the hearing before the Commissioner without counsel. While the record does not disclose the reason, it was due to the fact of conflicting engagements of his counsel and the petitioner's confusion that the hearing had to go on as scheduled. Instead of requesting a recess or continuance, the petitioner acquiesced to the hearing being conducted without his being represented by counsel. The hearing was held on April 26, 1941, whereas the petition was filed almost four years prior thereto.

He testified that he had been a farmer since 1912, in Greene County, Pennsylvania, from 1923-1933, and in Allegheny County, Pennsylvania, from 1933; that he had the assistance of a hired man; that he had 61 acres in 1937, cultivating 13 in addition to 8 acres of hay. He was uncertain *exactly* how many acres of each product he planted. During 1938, despite his farming activity he earned only 10% of his income, from that source. He was 73 years old at the time of the hearing. Part of the time from 1937-1940 he was employed on the W. P. A. and part of the time he was unemployed. HARBISON, one of the respondents herein, was present at the farm and saw the petitioner sow a crop, although it never materialized due to a drouth. On advice of counsel and because these bankruptcy proceedings were pending, he did not cultivate crops in 1940 (R. 82-89).

Despite this uncontradicted testimony the Commissioner found as a fact that your petitioner was not a farmer.

Jurisdiction.

The Supreme Court is asked to exercise its jurisdiction under Section 240 (a) of the Judicial Code (28 U. S. C. A. 347, 43 Stat. 938), or under Section 262 of the Judicial Code (28 U. S. C. A. 377, Stat. 1162): *In Re 620 Church St. Corp.*, 299 U. S. 24, 26 (1936).

Questions Involved and Reasons for Allowance of Writ of Certiorari.

I.

As to Substance.

WHERE A FARMER-DEBTOR NEARLY FOUR YEARS AFTER FILING HIS BANKRUPTCY PETITION TESTIFIES BEFORE THE CONCILIATION COMMISSIONER THAT HE HAS BEEN A FARMER SINCE 1912 UP TO AND INCLUDING 1937, THE YEAR IN WHICH HIS BANKRUPTCY PETITION WAS FILED, AND UNEQUIVOCALLY TESTIFIES THAT HE HAD 61 ACRES, OF WHICH 8 WERE USED FOR PRODUCING HAY AND 13 WERE USED FOR OTHER CROPS, SUCH AS SWEET CORN, BUT WAS UNABLE TO SPECIFICALLY BREAK DOWN THE NUMBER OF ACRES CULTIVATED WITH EACH CROP, WAS THERE SUFFICIENT WARRANT FOR THE CONCILIATION COMMISSIONER TO FIND THAT THE PETITIONER WAS NOT A FARMER, AND WAS IT ERROR FOR THE DISTRICT COURT TO CONFIRM SUCH FINDING AND FOR THE CIRCUIT COURT OF APPEALS TO AFFIRM IT?

It must be borne in mind that at the time of the hearing the petitioner was 73 and had gone through the strain of a long period of financial reverses. In addition, this hearing was held nearly four years after the filing of the petition under Sec. 75 of the Bankruptcy Act and at which he was not represented by counsel. The petitioner testified as to his farming activities which show jurisdictional sufficiency (R. 84-85). The respondents, however, took a few isolated and disjointed sections of the petitioner's testimony and strung them together as though it was his sole testimony on the subject (R. 73-74). Unfortunately the Circuit Court was "taken in" by this ruse (R. 97-8). It would be interesting to see how many farmers could tell how much of each crop was planted four years before the interrogation.

As was well stated by Mr. Justice Douglas, speaking for an unanimous court in *Wright* v. *Union Central Life Insurance Company, et al.*, 311 U. S. 273, 279, 61 S. Ct. 196, 200; 85 L. Ed. 184, 187:

> "The Act must be liberally construed to give the debtor the full measure of relief afforded by Congress —lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."

II.

Is it necessary that the principal part of a farmer's income be derived from farming operations?

The respondents urged in the Circuit Court of Appeals that cases construing the definition of "farmer" hold that he must be "bona fide primarily engaged in farming *and* receiving the principal part of his income from farming operations" (R. 74). This followed a certain portion of the petitioner's testimony wherein the respondent omitted to point the two lines subsequent to that which he printed. The two additional lines directly following that printed by respondent (R. 74) are as follows:

> "Q. Ten per cent of your income *in 1938* came from farming?
> A. I guess." (R. 86).

A reading of the definition of "farmer" (R. 95) discloses that two general classes of beneficiaries are intended: (1) individuals who primarily bona fide personally engage in producing products of the soil, including dairy farming, poultry, livestock or their products; or (2) those who derive the principal part of their income from any one or more of the foregoing operations.

To reach the objective called for by the respondent, it

would be obligatory to deprive farmers who received a minor part, or none, of their income from the crops they cultivated where the crops were damaged, because of a poor market, or adverse weather conditions. It was for the alleviation of the plight of these very persons that the Frazier-Lemke Act was passed.

The Court may take judicial notice of the fact that there was a depression from 1929 and that incomes of all people, including farmers, were greatly curtailed, if not eliminated, from that time, some of which has very recently changed due to war orders. Many people sought temporary employment in other fields or part-time employment. The petitioner did so when he worked for the W. P. A. part time and was unemployed part of the time since he did not make money out of the farm (R. 88). Should he be penalized for that? This has never been answered by the Supreme Court although the District Court of Washington, D. C., *In Re: Schermerhorn*, 41 F. Supp. 447, touched upon it. There a debtor, who maintained his home on a 16 acre farm for more than 16 years, boarded away from home near a mine in which he was temporarily working to support his family, intending to return to the farm if his debts could be scaled down. It was held he was a "farmer" within the meaning of the Act.

The case cited by respondent (R. 75), *In Re Day*, 10 F. Supp. 229, 28 Am. B. Rep. (N. S.) 469, does not apply. In that case the debtor was not a farmer and sought to come under the Act because he derived some income from a farmer-tenant of property owned by the debtor.

It is submitted that in the case at bar the debtor actually was a "dirt farmer" and the fact that sometime during 1937, the year in which the petition was filed, he sought some W. P. A. work or did engineering work is not controlling.

III.

As to Procedure.

May a Conciliation Commissioner, almost four years after the adjudication of the debtor as a bankrupt, sua sponte hold on the testimony in this case that the debtor was not a farmer?

There is a conflict of lower court decisions as to the right of the Commissioner to inquire sua sponte as to whether the debtor was a farmer. Is the burden in such case upon the petitioner to bring himself under the Act or is the burden upon the creditor to show the debtor is not within the Act?

The Supreme Court has never passed on this proposition.

Wherefore, your petitioner respectfully prays that he be afforded the following relief:

(1) Grant and issue a writ of certiorari upon the Circuit Court of Appeals for the Third Circuit to the end that this cause may be reviewed and determined by this Court and the orders of the Circuit Court of Appeals and of the District Court of the United States for the Western District of Pennsylvania may be reversed and that your petitioners may have such other and further relief as this Court may deem proper in the premises.

Dated at Pittsburgh, Pennsylvania, May 30, 1942.

Respectfully submitted,

Samuel George Wagner,
Dorothea M. Wagner,
Wagner & Wagner,
By —— ——,
Attorneys for Petitioner.